No. 15945

IN THE

# United States Court of Appeals

FOR THE NINTH CIRCUIT

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ALBERT GERSTEN, MYRON P. BECK and ANN H. BECK, MILTON GERSTEN and MARY GERSTEN,

*Petitioners,*

*vs.*

COMMISSIONER OF INTERNAL REVENUE,

*Respondent.*

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**Petition to Review a Decision of the Tax Court of the United States.**

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## REPLY BRIEF OF PETITIONERS.

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JACOB SHEARER,
*Attorney for Petitioners.*

TANNENBAUM, STEINBERG & SHEARER,
Suite 300,
151 El Camino Drive,
Beverly Hills, California,
*Of Counsel.*



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### ISSUE I.

**A. The Basic Issue Is Whether Petitioners' Income Should Be Measured by "Resort to Estimates, Assumptions and Speculation", or by Payments Received as and When Received.**

Respondent states the issue as being "one of determining whether the contracts here had a fair market value when distributed[1] . . ." (Resp. Br. p. 16.) Apart

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[1]It is assumed that respondent uses the phrase "fair market value" and the phrase "ascertainable fair market value" interchangeably, in view of his statement "that contracts like the ones here do have an ascertainable fair market value" on p. 23 of his brief.

from the effect of the rule of *Amend v. Commissioner of Internal Revenue,* 13 T. C. 178 (1949), separately discussed below, petitioners agree with this statement of the issue. Respondent continues, however, stating that "such a question has been repeatedly held to be a question of fact" and accordingly, that the issue is to be determined by the facts, so that the principles of *Burnet v. Logan,* 283 U. S. 404, are barred from consideration because its rationale may not be reached in the face of a conclusion by a trial court of the existence of ascertainable fair market value.

Petitioners see no useful purpose in debating whether or not the question of ascertainable fair market value or fair market value is one of pure fact or of mixed fact and law. Certainly an ultimate conclusion of a given value may well constitute a question of fact; but the road which reaches such a conclusion is paved with well established legal principles. Perhaps no better example of this exists than the judicial processes which took place in the case of *Burnet v. Logan, supra,* relied upon by the petitioners.

In the *Logan* case, taxpayer in 1916 had sold stock owned by her in a corporation which had, as one of its assets, the right to purchase iron ore which might be mined from a particular iron mine. The sale price of this stock, in addition to cash, included a promise to pay to the selling taxpayer 60¢ for each ton of ore sold to the corporation.

The findings of fact disclosed that from 1913 through 1926, several million tons of ore were mined. The Court further found as a fact that, as of March 11, 1916, the

mine had ore reserves of almost 83,000,000 tons and an expected life of 45 years.

Petitioners adduced testimony that no general market for the sale of their contract existed and that the contract had no ascertainable fair market value. Respondent introduced testimony, by two experts, respecting the ore reserves and the ability accurately to determine the ore reserves and the life of the mine. The experts on both sides agreed that economic conditions would affect the amount of ore mined in any one year. In fact, the evidence showed that the quantity of ore mined in any one year fluctuated greatly from 303,020 tons in 1921 to 3,029,265 tons in 1923 and that during the four year period prior to the sale of stock by taxpayer, the amounts mined varied from a high of 2,311,940 tons in 1915 to a low of 1,212,227 in 1914. There was no obligation on the part of the corporation owning and operating the mine to mine any ore in any year and neither the selling taxpayer nor the purchaser of the stock nor the corporation whose stock was sold could compel any such mining of ore by reason of contractual or other rights.

The Board of Tax Appeals (now the Tax Court) found that the selling taxpayers could reasonably expect to receive, over a period of approximately 45 years, an aggregate amount of approximately $6,000,000.00 and accordingly that the value of the contracts received by them as additional consideration for the sale of the stock, amounted to approximately $2.000,000.00. This determination was based upon a present value of an aggregate of approximately $6,000,000.00 payable ratably over a period of 45 years. That was the amount of the fair

market value determined by the respondent and used by him in computing deficiencies in taxes against the taxpayers.

The case was appealed and the Circuit Court of Appeals, Second Circuit, reversed the Tax Court. The Supreme Court granted certiorari. The opinion of the Circuit Court of Appeals will be referred to only to supplement the discussion of the Supreme Court's opinion.

The Tax Court found as an ultimate fact, there, as here, that the fair market value of the contract,[2] received by the taxpayer as part consideration for her transfer of the stock, was ascertainable. Accordingly, it determined that the measure of taxpayer's gain was the amount of cash, plus such fair market value of the contract minus her basis for the stock so transferred. The Supreme Court, however, held that, as any figure arrived at would be the result of mere estimates, assumptions and speculation, the contract had no ascertainable fair market value.[2a]

The opinion of the Circuit Court of Appeals expressed the foregoing in much the same vein but also noted the fact that "the estimate of recoverable tonnage of ore is very much in dispute; likewise the annual production and period of years estimated to complete the mining." (42 F. 2d 193, 196.) What was there involved, as here, was not conflicting testimony respecting the accuracy of any known fact, but a dispute concerning the estimates,

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[2]Parenthetically, it should be here noted that the basis of distinction by respondent of the cases relied upon by petitioners, is the absence of a finding by the Tax Court of the ultimate fact of the existence of fair market value.

[2a]See Appendix for excerpt of opinion.

and accordingly, the inferences and conclusions which might be drawn from those evidentiary facts which the trial court held to be correct.[3]

It is apparent, therefore, that the Tax Court may not, by mere articulation that there be a fair market value, so find; nor may the Tax Court, in seeking to decide whether there be an ascertainable fair market value, ignore the standards laid down by the appellate courts having jurisdiction to review its decisions. Neither the findings of fact adverted to by respondent[4] nor the generalization of the Tax Court, quoted by the respondent, that the "record amply sustains the respondent in his determination" adhere to such standards.

### B. The Particular Findings of Fact Pointed Out by Respondent as Supporting Tax Court's Decision Do Not Do So.

The so-called finding based upon the presumption of the correctness of respondent's determination (Resp. Br. p. 17) which respondent discusses as one of those findings of fact which support the Tax Court's decision, is not a finding of fact at all. Respondent contends that petitioners neither met their burden of overcoming the presumption of correctness of respondent's determination nor, indeed, made any attempt so to do. In support thereof, he

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[3]For this purpose, the conclusions of the Circuit Court of Appeals and the Supreme Court were just as valid even if they assumed, arguendo, that time would prove that the estimates of the government's experts and not of the taxpayers to be the more accurate.

[4]Subdivision B, entitled "Findings of fact which support the Tax Court's decision." (Resp. Br. p. 16.)

referred to the colloquy between the trial judge and petitioners' counsel. [R. p. 153.][4a]

Nothing else in the Record can possibly justify respondent's statement on this point; nor does the quoted material.

Petitioners met their burden by proving the following:[5]

(1) That nothing was payable by San Gabriel under contracts except to the extent of an amount measured by a percentage of amounts received by San Gabriel from certain of its customers.

(2) These amounts fluctuated substantially from year to year.

(3) That neither San Gabriel nor petitioners had a legal right to require San Gabriel customers to purchase any water, in any amount, or at any given time.

(4) That the contingent right measured in the next two preceding paragraphs was limited by a ceiling amount.

(5) That these contingent rights in any event were extinguished at a fixed period of time.

Petitioners further proved, by the uncontradicted testimony of Mr. Moseley and Mr. Garnier that the amount of water to be sold by San Gabriel depended upon many contingencies, some of which were weather changes from year to year, varying conditions of the houses, and varying economic conditions.[6] The existence of these contingencies

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[4a]See Appendix for excerpt of Record on which Respondent relies.

[5]Paragraphs 1 through 70, both inclusive, and paragraphs 72 through 78, both inclusive, the Supplemental Stipulation of Facts [R. pp. 105-122, both inclusive] and Exhibits 1 to 7, made a part of the Stipulation. [R. p. 120.]

[6]Note the testimony of Mr. Moseley. [R. p. 200.]

as affecting the amount of water sold is grudgingly conceded even by respondent in his brief at pages 19 and 25.

No more was proved by the taxpayers in *Logan, Smith, Carter* or *Bradford,* and yet in each of those cases, the Court necessarily held that the taxpayers had met their burden of proof to overcome the presumption of correctness of the Commissioner's determination.

Since petitioners met this burden, it was thereupon incumbent upon respondent to go forward with his proof as if the presumption had never existed.[7]

In *Wiget v. Becker,* 84 F. 2d 706, 708, the court described the nature of the presumption of correctness as a "burden of proof presumption" which merely requires " 'the other party to proceed with the negative. Unless he does, he loses; *when he does, the presumption is out of the case, and the issue is open.*' " (Emphasis added.)

The Tax Court itself recognized this principle in *Friedlaender v. Commissioner,* 26 T. C. 1005 (1956).

Accordingly, in considering whether the findings of fact, upon which respondent relies, support the Tax Court's conclusion, no gloss of inferences favorable to respondent may be added because of the presumption of correctness which in the first instance shields respondent's determination.

As to each contention respondent makes respecting the evidence (other than the sales of the six contracts to be separately discussed) he must concede the existence

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[7]*U. S. v. Pulver,* 54 F. 2d 261 (C. C. A. 2nd, 1931), cited in *Wiget v. Becker,* 84 F. 2d 706 (C. C. A. 8th, 1936), and *Friedlaender v. Commissioner,* 26 T. C. 1005 (1956), A. 1957—1 CB 4, *A. and A. Tool and Supply Co. v. Commissioner,* 182 F. 2d 300 (10th Cir., 1950).

of variables and contingencies[8] affecting the use of water, and consequently the payments under the contracts. This factor renders impossible a commutation of future payments to a present value, even if the estimates purported to be as expert and unequivocal as those made in *Logan*. Respondent so concedes with respect to the commencement of payments and the unexpired period of time,[9] with respect to occupancy,[10] and with respect to the 70% estimate.[11]

The burden was upon respondent to bring before the trial court such facts upon which he wished to rely to demonstrate a use of water in such a sufficiently regular and steady stream that a commutation of the consequent regular future payments could be made "without resort to mere estimates, assumptions and speculation" as were accepted by the Board of Tax Appeals but rejected by the Circuit Court of Appeals and by the Supreme Court of the United States in *Burnet v. Logan* (*supra*).

Whether or not respondent could have adduced evidence by way of stipulation or testimony to refute the facts relied upon by petitioners, he may not estimate the comparative amount of water used for indoor purposes, he may not assume that the occupants of the houses will, by some fortuitous circumstances, constitute in large measure lovers of plants and lawns,

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[8]The trial judge more candidly expressed additional examples of variations, recognizing that not all people have the same amount of "plantings and vegetation needing irrigation" or the same "number of water consuming appliances." [R. p. 70.]

[9]Resp. Br. p. 19 ". . . there were of course some contingencies such as variations in weather."

[10]Resp. Br. p. 20 "We do not of course know how many people would be using water under contracts here."

[11]Resp. Br. p. 21 the "seventy per cent would be an average return on such contracts as some would pay off much less and some would pay off more."

flowers and trees as distinguished from lovers of cactus and rock gardens or of black top and concrete, nor may he speculate that the section here involved was "a nice residential section in which the home owners would take a great deal of pride". (Resp. Br. p. 19.) Whether respondent refers to the payments which he predicts will continue for seven to ten years or to the probable occupancy or to the 70% average, he must estimate, assume or speculate. Moreover, the estimates are much more equivocally made than those which were made by the experts and struck down by the Supreme Court in the *Logan* case.

Respondent also adverts to the fact of six sales of contracts similar to those here involved. Petitioners have covered in their opening brief,[12] the circumstances, or more accurately, the virtually complete lack of known circumstances surrounding these sales.

If the reference to the sales is for the purpose of demonstrating that a market existed in which contracts such as these readily passed from hand to hand in commerce with such reasonable regularity and continuity that the quoted sales price of the contracts would be sufficient to establish the existence of a fair market value, petitioners submit that the existence of the six sales have no persuasive value. By proving facts which brought the transactions here involved squarely within *Burnet v. Logan*,[13] *J. C. Bradford v. Commissioner*,[14] *Commissioner v. Carter*,[15] *Westover v. Smith*,[16] and *Lentz v. Commissioner*,[17] petitioners over-

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[12]Petitioners' Opening Brief, page 24.

[13]283 U. S. 404.

[14]22 T. C. 1057.

[15]170 F. 2d 911 (C. C. A. 2, 1948).

[16]173 F. 2d 90 (C. A. 9, 1949).

[17]28 T. C. 1157 (1957).

came the presumption of correctness of respondent's determination, and that presumption disappeared from the case. Therefore, it was not incumbent upon petitioners to prove the negative, the non-existence of the market. If, on the other hand, respondent desired to rely upon the fact that such a market existed, the burden was on him to prove it.

The underlying facts in this case are not in conflict. Any conflict which did arise related solely to matters of opinion, and not to the events and transactions which actually occurred.

### C. Respondent's Distinction of the Cases Relied Upon by Petitioners Is Unsound.

Respondent's distinction of the *Logan* case seems to be that the future in this case, unlike the facts and circumstances upon which the promise of future payments was there contingent, could be foretold with "fair certainty". (Resp. Br. p. 24.) It is ironic that even as respondent seeks to escape the "estimates, assumptions and speculation" rejected in *Logan,* he must qualify the certainty he attributes to San Gabriel's sales with "some variations in revenue due to seasonal changes and *other causes*".[18] (Resp. Br. p. 25.) (Emphasis added.)

Respondent adds, apparently as a further distinction, that there is also evidence here that similar contract rights had been sold by other persons "whereas there was no similar evidence in the *Logan* case". On this point, the

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[18]Respondent's neat conversion of "variations in weather" to "seasonal changes" does not help, for the Record shows variations in rainfall from year to year and if it did not the Court may take judicial notice thereof. As for "other causes", it is unrefuted that at least one such "other cause" of varying use of water was economic conditions, a factor which played so important a part in the *Logan* case.

Circuit Court of Appeals, whose decision[19] was affirmed by the Supreme Court on substantially the same rationale, stated at page 195, that

> "Congress, by the phrase 'fair market value' meant that, not only must the market price be ascertained by sales, but [the] sales so made, and the circumstances under which they were made, were to be considered to determine whether such sales served to evidence . . . a market sale . . ."

With a limited exception[20] the Record does not disclose the terms or conditions or the time of any of the six isolated sales, or whether or not they were made under circumstances involving a willing buyer or a willing seller neither of whom were compelled to buy or sell.

Respondent's distinction of *Westover v. Smith*[21] is based upon the reasoning that "no question could be or was raised either in the District Court or this Court on Appeal as to whether the taxpayer's right to payment had any ascertainable fair market value in 1940". Respondent, however, overlooks the rationale of the Court's opinion in the *Smith* case, that in order to avoid speculation resulting in inaccuracies and inequities, the proper procedure is to measure the value of the contract as the payments are received.[22] The *Carter* case, of course, as indicated both by respondent in his brief (Resp. Br. pp. 26-27) and the Court in the *Smith* case, expresses the same rationale.

To distinguish *Bradford v. Commissioner*, 22 T. C. 1057, the facts of which appear to be virtually identical

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[19]42 F. 2d 193.

[20]We know only that one sale was made in 1953 [R. p. 231] and the price in another appeared to be 12% of the outstanding balance.

[21]173 F. 2d 90.

[22]Note the Court's opinion at page 92.

with those here involved, respondent's sole distinction is based upon the fact that the Tax Court there "made specific findings that in view of the contingent elements . . . no fair market value was ascertainable." (Resp. Br. p. 28.) The Tax Court, however, in the *Bradford* opinion, sheds light on the reason for its finding. upon which respondent relies, when it treats this type of contract as indistinguishable from those of *Commissioner v. Carter* and *Westover v. Smith,* closing this phase of its opinion (at p. 1073) as follows:

> "The above cases [Carter and Smith] rely primarily upon Burnet v. Logan, 283 U. S. 404, which, we agree, is controlling."

That the Tax Court there held one way, and here the opposite, justifies not a distinction, but a reversal.

*Lentz v. Commissioner,* 28 T. C. 1157, is virtually identical in facts with *Commissioner v. Carter, supra.*

### D. Even a Fixed Promise to Pay Money in the Future Is Not a Cash Equivalent.

In respondent's further discussion of *Kasper v. Banek,* 214 F. 2d 125, *Amend v. Commissioner,* 13 T. C. 178, and Revenue Ruling 58-162, 1958-15 Int. Rev. Bull. 12, it is apparent that he mistakenly believes that the taxpayers there each had "made a contract which calls for *delivery as well as payment* early in the subsequent year". (Resp. Br. p. 28.) (Emphasis added.) The court's opinion in the *Kasper* case, on page 126 discloses that the purchaser actually had possession of the wheat at the time of the contract for sale. In the *Amend* case, which the U. S. Court of Appeals for the 8th Circuit approved in the *Banek* case, the Tax Court, at page 183, found as a fact that shipment was to be made at once with payment in the subsequent year.

Similarly, in the Revenue Ruling, at page 13, the statement is made, relying on *Amend,* that "the seller had no legal right to demand and receive payment for his wheat until *the year following* the contract of sale and *delivery.*" (Emphasis added.)

From the foregoing it is apparent that respondent's attempt to distinguish these authorities, on the basis of delayed delivery, is erroneous.

Respondent's basic distinction of the *Kasper* and *Amend* cases, and the Revenue Ruling rests in the fact that those authorities simply discuss constructive receipt of income. The point of the decision and the Revenue Ruling, however, and their pertinence here, lies in the determination that, if there be no constructive receipt of income, the cash basis taxpayer is not required to report in income, as a cash equivalent, the value of the contract in the year he obtains the contract.

The concept articulated in these cases, finds its roots in *Bedell v. Commissioner of Internal Revenue,* 30 F. 2d 622 (C. C. A. 2, 1929). In that case, L. Hand, Circuit Judge, pointed out[23] that even if the case were like a promise to pay in the future for a title which passes at the time of the contract, the profit would still not be reckoned as of the time of sale.

In the case of *Johnston v. Commissioner,* 14 T. C. 560 (1950), a stockholder (a cash basis taxpayer) sold stock of a corporation under a contract whereby the stock was delivered to the purchaser[24] in 1942, but the purchase price

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[23]At page 624 (see Appendix for excerpt).

[24]The headnote of the reported case erroneously describes delivery of the stock to the "sellers" but the text of the opinion, at page 563, makes it clear that such delivery was, of course, to the "purchasers".

(which was subject to adjustments) was deposited with a bank in escrow for payment, early in 1953, and, in the absence of intervening claims, the balance later in 1953.

The Tax Court held that even if, *arguendo,* petitioner was correct in his contention that the cash deposit in the bank in 1942 was subject to petitioner's demand that since his share of the deposited cash "was less than his basis for gain on his stock . . . he, on a cash basis, realized no gain until the 'amount realized' by receipt exceeds that basis. Burnet v. Logan, 283 U. S. 404."[25]

The court, in support of its holding, made the following observation, at page 565:

> "But such an agreement to pay the balance of the purchase price in the future has no tax significance to either purchaser or seller if he is using a cash system."

In support of its position, the Tax Court also relied upon *Bedell v. Commissioner, supra.*

That the uncertainty caused by the adjustment was an unimportant factor in the court's decision is evidenced by *Ennis v. Commissioner,* 17 T. C. 465 (1951), which, like the *Johnston* case on which it relied, was reviewed by the entire Tax Court. It held that the obligations flowing to the seller under the contract were not the "equivalent of cash", stating, at page 470, that

> "in determining what obligations are the 'equivalent of cash, the requirement has always been that the obligation, like money, be freely and easily negotiable so that it readily passes from hand to hand in commerce."

The point of the authorities cited in this subdivision is not unrelated to the concept of the *Logan* case, that

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[25]At page 565.

basically, the income tax is levied upon income or gain and not upon capital. True it is that unlike the *Burnet v. Logan* case, these authorities involved promises to pay a fixed or specified amount in the future, but even though the amount be so fixed, it is apparent that such a future obligation, if not freely traded in commerce, may still fall short of that cash equivalent which must be included in the measure of income tax, as money's worth. Obviously, where the promise to pay in the future is not fixed but is contingent upon future events involving estimates, assumptions and speculation, the presence of a cash equivalent is even more remote.

## ISSUE II.

### The Joint Return Issue.

In support of the Tax Court's decision, respondent primarily relies upon Section 90, Section 61, Sections 131 and 132, and Section 150.1 of the California Civil Code. The sections cited by respondent are not all directly applicable, although petitioner does not deny that there is an interrelationship between them. However, the issue with which we are directly concerned here is not whether petitioner Albert Gersten (sometimes herein called "Albert") obtained a decree of divorce, final or interlocutory, in California, or a decree of divorce in Mexico, valid or invalid, but simply whether, on December 31, 1950, insofar as California law was concerned, he was married to Bernice Ann Gersten (sometimes herein called "Bernice"), with whom he filed a joint return. The question of the validity or effectiveness of his prior divorce decree or decrees are material only to the extent that they may preclude recognition under California law of a marriage in 1950 between Albert and Bernice.

The California Civil Code section which primarily concerns us here, therefore, is Section 61 which, with Section

132, are the only sections relating to a subsequent marriage cited by respondent. The other California Civil Code sections cited by him relate only to the matter of divorce or dissolution.

Respondent contends (Resp. Br. p. 30) that the "applicable provisions of California law are written in such plain and concise language that they should be and have been repeatedly interpreted and applied strictly as written". It may be that Section 61 is written in plain and concise language and it is certainly true that that section has been often interpreted. It is not true, however, that the interpretations have been consistent, or that the section has been applied strictly as written.[26] Otherwise, it is difficult to understand why the Supreme Court of California, in *Spellens v. Spellens,* 49 Cal. 2d 210, went to the lengths which it did to reconcile the apparent prohibition of Section 61 with its conclusion, at page 220, that

> "The public policy of this state (California) requires the *preservation of the second marriage* and the protection of the rights of the *second spouse* 'rather than a dubious attempt to resurrect the original' marriage. (Rediker v. Rediker, 35 Cal. 2d 796, 806.)" (Emphasis added.)

In each of the cases, the "original marriage" was, under respondent's view of the law, still in existence. It becomes pertinent, therefore, to ask to what second marriage the Supreme Court referred in *Spellens v. Spellens* (*supra*), *Rediker v. Rediker* (*supra*), and *Dietrich v. Dietrich,* 41 Cal. 2d 497. See also *Watson v. Watson,* 39 Cal. 2d 305.

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[26] (The cases interpreting Section 61 are, *Spellens v. Spellens,* 49 Cal. 2d 210 (1957); *Sullivan v. Sullivan,* 219 Cal. 734 (1934); *Estate of Elliott,* 165 Cal. 339, 132 Pac. 439 (1913); *Dominguez v. Dominguez,* 136 Cal. App. 2d 17 (1955), and *Parmann v. Parmann,* 56 Cal. App. 2d 67, 132 P. 2d 851 (1942). In *Spellens,* the California Supreme Court announced that to the extent the remaining four might be to the contrary, they were overruled.)

The California Supreme Court, at page 221, went so far as to restrict its prior statement in *Rediker v. Rediker,* "that the doctrine of estoppel 'presupposes the entry of final decree' " by declaring that it did not lay down a rule contrary to the Court's conclusion in Spellens, but even "if it seems to do so none is indicated in the other and later authorities heretofore cited."[28]

The court then went on to distinguish various cases, including *Estate of Elliott,* 165 Cal. 339 (1913), where Section 61 was relied upon, and which, in its basic facts, almost completely parallels both *Estate of Dargie,* 162 Cal. 51, 121 Pac. 320, and *Estate of Seiler,* 164 Cal. 181, 128 Pac. 334, relied upon by respondent.

On the subject of California Civil Code, Section 61, which respondent contends is written in "plain and concise language", and the contention that it has been "applied strictly as written," the California Supreme Court in the *Spellens case,* at page 221, has this to say:

> "An interlocutory decree of divorce at least gives color as a judicial determination of divorce especially when we consider that the final decree ordinarily follows at the end of a year as a matter of course."

This statement, even without reference to the background of the facts in the *Spellens* case, seems rather to support the proposition that "the plain and concise" language of Section 61, respecting the validity of a marriage "contracted within *one year* [not four days] after the entry of an interlocutory decree" is given something less than a strict interpretation.

In view of the foregoing, it becomes unnecessary to discuss at any length the remaining sections of the California Civil Code cited by respondent. Section 90 applied

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[28](At p. 221.)

to Mrs. Spellens, but that did not prevent the California Supreme Court from preserving her second marriage. Section 131 is material only in that it supports the comments of the court in the Spellens opinion concerning the finality of the interlocutory decree. The portion of Section 132 to which respondent refers (Resp. Br. p. 31) has no greater force or validity than Section 61, with which the *Spellens* case dealt. California Civil Code, Section 150.1 lends no aid to respondent, since at the most it provides that Albert's Mexican divorce was invalid; but Mrs. Spellens obtained no Mexican divorce and accordingly, Albert's position is at least as strong as hers.

Respondent seeks to distinguish the *Spellens* case upon the ground that it did not validate the second marriage but simply estopped the defendant from denying support and maintenance to the plaintiff (Resp. Br. p. 33). Accordingly, respondent (Resp. Br. p. 34) contends that the *Spellens* case should be limited to "situations where one party to the second marriage is attempting to take advantage of the other". Such a distinction and such a limitation may find some comfort in the language that "the theory is that marriage is not validated", but it is certainly inconsistent with the determination by the court in the *Spellens, Rediker, Dietrich* and *Watson* cases to the effect that it is California's law and policy to preserve the second marriage, though that second marriage took place after a decree of divorce which was either an interlocutory decree in California or a foreign decree of questionable validity.

Although the concepts of the preservation of the second marriage, on the one hand, and its invalidity, on the other, may present an apparent conflict and ambiguity it is certain and clear that all the property rights which pertain to the most regular of marriages, apply also to the second

marriage, preserved under the *Spellens* rule[29] and as between the parties, all the rights of status apply. Accordingly, respondent, in interpreting Section 51(b) of the 1939 Internal Revenue Code, should use as his guide the congressional purpose for its enactment[30] and recognize a marriage which has enough validity to entitle the parties thereto to all marital rights, including ownership by each of one-half of the community income. Otherwise, respondent will have achieved the absurd result of reinstating the advantage in favor of community over non-community property state domicilliaries, whose status is similar to that of Albert and Bernice and of Mr. and Mrs. Spellens, an advantage which Congress sought to abolish.

When respondent suggests that the *Spellens* case "should be followed only in situations where one party to the second marriage is attempting to take advantage of the other" (Resp. Br. p. 34), he ignores the purpose of California law, dictated by its public policy, in cases such as these, to preserve the second marriage, and not to attempt to resurrect the dead first marriage. Since respondent concedes that state law applies, he would do well to accept rather than to thwart its basic policy.

Respondent has not always been as rigid in his attitude toward second marriages such as that here involved and as involved in the *Spellens* case, as is evident from *General Counsel Memorandum 25250,* Cum. Bull. 1947-2, p. 32, cited and discussed in Petitioners' Opening Brief at pages 40 and 41.

The cases of *Estate of Dargie,* 162 Cal. 51, *Brown v. Brown,* 170 Cal. 1, and *Estate of Seiler,* 164 Cal. 181

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[29](At p. 222.)

[30](*Cf.* House Committee Report; 1948 Revenue Act. C.B. 1948-1, p. 301.)

(Resp. Br. pp. 35-36) lend nothing to respondent's position, since the reasoning directed above to Section 90 has equal application to the relationship of these cases to the point here involved. The same may be said of *Commissioner v. Ostler,* 237 F. 2d 501,[31] and *United States v. Holcomb,* 237 F. 2d 502, where no second marriage was involved.

*Paulus v. Bauder,* 106 Cal. App. 2d 589, decided prior to the *Spellens* case and by an intermediate California appellate court, is an example of the first wife being unable to sue her husband in tort after the interlocutory decree but prior to the final decree. If that be significant, even more so should be the holding of the California Supreme Court in the *Spellens* case in refusing to permit the second wife from pursuing a tort remedy against her husband of the second marriage.

Respectfully submitted,

Jacob Shearer,

*Attorney for Petitioners.*

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[31]The court somewhat reluctantly rejected the merits of Commissioner's argument that the interlocutory decree be treated as one of legal separation, but did so to be uniform with other decisions from other Circuits. Had the opinion in the *Spellens* case, particularly respecting the finality of the California interlocutory decree, preceded the *Ostler* case, the court's reluctance might well have been increased.

## APPENDIX.

INTERNAL REVENUE CODE OF 1939

Section 51. Individual Returns

(a) * * *

(b) Husband and Wife.—

(1) In General.—A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

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* * *

(5) Determination of Status.—For the purpose of this section.— * * *

(B) An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.

CIVIL CODE OF CALIFORNIA

Section 61. (Subsequent marriages void: Exceptions: Interval following divorce: Marriage valid until annulled where former spouse absent)

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annuled or dissolved. In no case can a marriage of either of the parties during the life of the other, be valid in this state, if contracted within one year after the entry of an interlocutory decree in a proceeding for divorce.

2. Unless such former husband or wife is absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or is generally reputed or believed by such person to be dead at the time such subsequent marriage was contracted. In either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

CIVIL CODE OF CALIFORNIA

Section 90. (Marriage, how dissolved.)

Marriage is dissolved only:

One—By the death of one of the parties; or,

Two—By the judgment of a Court of competent jurisdiction decreeing a divorce of the parties.

CIVIL CODE OF CALIFORNIA

Section 131. (Filing decisions and conclusions: Entry of final or interlocutory judgment: Restoration of maiden name: Dismissal.)

In actions for divorce, the court must file its decision and conclusions of law as in other cases, and if it determines that no divorce shall be granted, final judgment must thereupon be entered accordingly. If it determines that the divorce ought to be granted, an interlocutory judgment must be entered, declaring that the party in whose favor the court decides is entitled to a divorce; and the court may, in its discretion and regardless of whether or not a request therefor was included in the prayer of the complaint, restore the maiden name of the wife or the name under which she was married. After the entry of the interlocutory judgment, neither party shall have the right to dismiss the action without the consent of the other.

CIVIL CODE OF CALIFORNIA

Section 132. (Final judgment granting divorce: Entry after one year: Effect of judgment: Entry where appeal taken or new trial motion made: Effect of death of party: Entry no validation of intervening marriage nor defense to criminal charge.)

When one year has expired after the entry of such interlocutory judgment, the court on motion of either party, or upon its own motion, may enter the final judgment granting the divorce, and such final judgment shall restore them to the status of single persons, and permit either to marry after the entry thereof; and such other and further relief as may be necessary to complete disposition of the action, but if any appeal is taken from the interlocutory judgment or motion for a new trial made, final judgment shall not be entered until such motion or appeal has been finally disposed of, nor then, if the motion has been granted or judgment reversed. The death of either party after the entry of the interlocutory judgment does not impair the power of the court to enter final judgment as hereinbefore provided; but such entry shall not validate any marriage contracted by either party before the entry of such final judgment, nor constitute any defense of any criminal prosecution made against either.

CIVIL CODE OF CALIFORNIA

Section 150.1. (Divorce in another jurisdiction of no effect where parties domiciled in State.)

A divorce obtained in another jurisdiction shall be of no force or effect in this State, if both parties to the marriage were domiciled in this State at the time the proceeding for the divorce was commenced.

Excerpt from Burnet v. Logan, 283 U. S. 404, at pages 412 and 413:

> "Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate [for estate tax purposes]. As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined *without resort to mere estimates, assumptions and speculation.* When the profit, if any, is actually realized, the taxpayer will be required to respond. The consideration for the sale was $2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. *It had no ascertainable fair market value.*" (Emphasis added.)

Excerpt from Record at page 153.

> "The Court: Well, I want to ask counsel for the petitioner: *The respondent in his determination,* as I understand it, *has placed the amount* in computing the receipts from liquidation of the corporation in respect to these water main matters at *50 per cent?*
>
> Mr. Shearer: Yes, your Honor.
>
> The Court: Now, assuming that the Court concludes the argument or contention relying on Logan versus Burnett, and Westover versus Smith, is not well taken, *is the petitioner contesting the 50 percent determination?*

Mr. Shearer: We are not conceding it, your Honor, but we recognize we will not have met our burden in overcoming . . .

The Court: You what?

Mr. Shearer: We do not conclude it, but we recognize that we will not have met our burden in connection with the presumption.

The Court: All right. In other words, you don't intend to put on any proof?

Mr. Shearer: Not valuation *with respect to that point.*" (Emphasis added.) [R. p. 153.]

Excerpt from Bedell v. Commissioner of Internal Revenue, 30 F. 2d 622 (C. C. A. 2, 1929), at page 624.

"If a company sells out its plant for a negotiable bond issue payable in the future, the profit may be determined by the present market value of the bonds. But if land or a chattel is sold, and title passes merely upon a promise to pay money at some future date, to speak of the promise as property exchanged for the title appears to us a strained use of language, when calculating profits under the income tax. . . . It is absurd to speak of a promise to pay a sum in the future, as having a 'market value,' fair or unfair. Such rights are sold, if at all, only by seeking out a purchaser and higgling with him on the basis of the particular transaction. Even if we could treat the case as an exchange of property, the profit would be realized only when the promise was performed."